

**Class Counsel Beware:**  
***Fiduciary Obligations Extend Beyond Class Certification Order***

If your legal acumen helped recover \$90 Million for the plaintiffs in a class action, you would expect a pat on the back, congratulations, or a thank you note at the very minimum. Regrettably, lawyers who deserve kudos often receive ingratitude. In some cases, triumphant lawyers get sued for malpractice. In even more rare occasions, victorious lawyers face considerable professional liability exposure.

The recent California decision in Janik v. Rudy, Exelrod & Zieff, 2004 Daily Journal D.A.R. 7523, proves this unfortunate reality. It should serve as a warning to all attorneys who are pursuing or are considering pursuing a class action.

The \$90 Million Verdict

In October 1996, the law firm Rudy, Exelrod & Zieff (“class counsel”) filed a class action against Farmers Insurance Exchange on behalf of approximately 2,400 of its claims representatives to recover for nonpayment of overtime compensation. The complaint alleged a single cause of action for violation of overtime rights under Labor Code section 1194 and related Labor Code provisions. The trial court certified the class. The class plaintiffs moved for summary adjudication to establish the claims representatives were not exempt from overtime regulations and were entitled to overtime pay. The trial court granted the motion. The remaining issue of damages went to trial before a jury and a verdict was rendered for approximately \$90 million in unpaid overtime wages.

The Malpractice Action

Approximately one year later, a former class member, Stanley Janik (“Janik”), sued class counsel for malpractice and breach of fiduciary duty. Notwithstanding the gargantuan nature of the jury verdict, he claimed the award should have been bigger.

Specifically, Janik contended class counsel should have pursued the claim for unpaid wages under California’s Unfair Competition Law, Business and Professions Code Section 17200, et seq. (“UCL”). According to Janik’s complaint, California law clearly provided a Labor Code violation for failure to pay overtime was also a violation of the UCL. More importantly, a four-year limitations period applies to a UCL claim rather than the three-year limitations period that governs Labor Code actions. As a result, asserting a UCL claim would have expanded the class and permitted the class to recover millions of dollars of wages that should have been paid for the extra year.

Class counsel demurred to the complaint claiming it had no duty to assert claims other than those the trial court approved in the class certification order. The trial court sustained the demurrer and the decision was reversed on appeal.

The Court of Appeal found the duty of class counsel is not limited by the class certification

order. Instead, class counsel owed a duty to consider and assert as appropriate all related claims arising out of the same facts as the claims included in the class certification order that class members would reasonably expect to be considered. Thus, class counsel “was obliged to consider the advantages and disadvantages to the class of seeking to add a UCL cause of action to their complaint, to bring these considerations to the attention of the class representatives, and to take or recommend such action (including of course the possibility of doing nothing with respect to such an additional claim) as would an attorney using the ‘skill, prudence and diligence’ commonly exercised by attorneys handling such litigation. (Citations Omitted).”

The issue of whether or not the duty to consider all relevant claims was met in this instance was considered a question of fact not appropriate for consideration on review of a demurrer ruling.

Finally, class counsel argued the chronology of the underlying case established it was not negligent as a matter of law. Class counsel contended that prior to the California Supreme Court decision in Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, there was no authority to support a claim for unpaid wages under the UCL. The Cortez decision was rendered after summary adjudication was rendered in the plaintiffs’ favor, and at a point when a motion to amend the complaint could not be made. The Court of Appeal disagreed with the suggestion that there was no authority supporting a UCL claim for unpaid wages prior to Cortez and with the conclusion that a motion to amend the complaint was doomed to fail.

### Lesson for Class Counsel

The Janik decision might make class action attorneys nervous. It should not.

Janik does not suggest class counsel should assert every claim the facts of a case could possibly support or it will face malpractice liability. In fact, our Rules of Professional Conduct and the Code of Civil Procedure require otherwise. See, e.g. Code Civ. Proc. §128.7 (prohibiting the filing of claims that lack plausible legal or factual support).

Instead, class counsel should consider all potential claims and respond in an appropriate manner consistent with their professional standard of care. This means, if there are good reasons not to assert a claim, those should be discussed with the class representative and a collective and informed decision should be made as to whether or not the claim will be pursued.

If a decision is made not to pursue a potential claim, what should class counsel do to avoid potential malpractice liability to disgruntled class members? Janik recommends asking the trial court for help:

If class counsel has any question concerning the course that is required by the duty it owes absent class members, the attorneys may seek guidance from the court. ... If the issue on which a malpractice complaint is based has been considered and determined in the class action proceedings, the rulings of the class action court will be binding on members of the class and preclude reconsideration of those matters in another forum. (Citations Omitted).

Thus, class counsel may wish to inform the court of any potential claims it has decided not to pursue and ask the trial court for “guidance” regarding this decision. Counsel may ask the trial court to confirm its decision not to pursue a claim was consistent with its fiduciary obligations or appropriate under the circumstances. Counsel may even request an order to that effect although it is not entirely clear from Janik that such an order must or may be issued. If the trial court or class representative disagree with the recommendation not to pursue a particular claim, class counsel may wish to reconsider its position.

\*Mr. Skeen received his Juris Doctorate, with Great Distinction, Order of the Coif, from University of the Pacific, McGeorge School of Law, in 1996. He is a senior associate in the law firm Schwartz Semerdjian Haile Ballard & Cauley LLP, where his practice includes complex commercial litigation including class actions and unfair competition claims, real estate, business and employment litigation.

**Published in *Trial Bar News*, Volume 27, Issue 7, August/September 2004**

**Spencer C. Skeen, Esq.**

**Schwartz Semerdjian Haile Ballard & Cauley LLP**